

**James Madison to James Monroe, December 27,
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TO JAMES MONROE. MAD. MSS.

Montpellier, Dec. 27, 1817

Dear Sir Your favor of the 22d has been duly recd. I am so much aware that you have not a moment to spare from your public duties, that I insist on your never answering my letters out of mere civility. This rule I hope will be applied to the present as well as future letters.

My quere as to the expedition agts. Amelia Island turned solely on the applicability of the *Executive* power to such a case. That relating to the right to Indian lands was suggested by the principle which has limited the claim of the U. S. to a right of pre-emption. It seemed also that an *unqualified* right of a Civilized people to land used by people in the hunter-state, on the principle that the earth was intended for those who would make it most conducive to the sustenance & increase of the human race, might imply a right in a people cultivating it with the Spade, to say to one using the plow, either adopt our mode, or let us substitute it ourselves. It might also be not easy to repel the claims of those without land in other Countries, if not in our own, to vacant lands within the U. S. likely to remain for a *long* period unproductive of human food. The quere was not meant to contest the doctrine of the Message, under qualifications which were probably entertained without being specified.

The Cumberland road having been a measure taken during the administration of Mr. Jefferson, and, as far as I recollect, not then brought to my particular attention, I cannot

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assign the grounds assumed for it by Congress, or which produced his sanction. I suspect that the question of Constitutionality was but slightly if at all examined by the former. And that the Executive assent was doubtingly or hastily given. Having once become a law, and being a measure of singular utility, additional appropriations took place, of course under the same Administration, and, with the accumulated impulse thence derived, were continued under the succeeding one, with less of critical investigation perhaps than was due to the case. Be all this as it may, the case is distinguished from that now before Congress, by the circumstances 1. that the road was undertaken essentially for the accommodation of a portion of the Country with respect to which Congs. have a general power not applicable to other portions. 2. that the funds appropriated, & which alone have been applied, were also under a general power of Congs. not applicable to other funds. As a precedent, the case is evidently without the weight allowed to that of the National Bank which had been often a subject of solemn discussion in Congs. had long engaged the critical attention of the public, and had received reiterated & deliberate sanctions of every branch of the Govt., to all which had been superadded many positive concurrences of the States, and implied ones by the people at large. The Bank case is analogous to that of the Carriage tax, which was generally regarded by those who opposed the Bank as a direct tax & therefore unconstitutional, and did not receive their acquiescence until these objections were superseded by the highest Judicial as well as other sanctions. As to the case of post roads & military roads; instead of implying a general power to make roads, the constitutionality of them must be tested by the bona fide object of the particular roads. The Post cannot travel, nor troops march without a road. If the necessary roads cannot be found, they must of course be provided.

Serious danger seems to be threatened to the genuine sense of the Constitution, not only by an unwarrantable latitude of construction, but by the use made of precedents which cannot be supposed to have had in the view of their Authors, the bearing contended for, and even where they may have crept, thro' inadvertence, into acts of Congs. & been

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signed by the Executive at a midnight hour, in the midst of a group scarcely admitting perusal, & under a weariness of mind as little admitting a vigilant attention.

Another & perhaps a greater danger is to be apprehended from the influence which the usefulness & popularity of measures may have on questions of their Constitutionality. It is difficult to conceive that any thing short of that influence cd. have overcome

the constitutional and other objections to the Bill on roads & Canals which passed the 2 Houses at the last Session.

These considerations remind me of the attempts in the Convention to vest in the Judiciary Dept. a qualified negative on Legislative *bills*. Such a Controul, restricted to Constitutional points, besides giving greater stability & system to the rules of expounding the Instrument, would have precluded the question of a Judiciary annulment of Legislative *Acts*. But I am running far beyond the subject presented in your letter, and will detain you no longer than to assure you of my highest respect & sincerest regard.